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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MARDIAN AND ASSOCIATES et al., Plaintiffs and Appellants, v. GLENDALE CITY COUNCIL et al., Defendants and Respondents; CHEVY CHASE ESTATES ASSOCIATION, Respondent and Real Party in Interest.	B163448 (Los Angeles County Super. Ct. No. BS073330)

APPEAL from a judgment of the Superior Court of Los Angeles County. David P. Yaffe, Judge. Affirmed.

Baker, Olson, LeCroy & Danielian, John M. Gantus, and Eric Olson for Plaintiffs and Appellants.

Scott H. Howard, City Attorney, and Steven E. Weitz, Assistant City Attorney for Respondents City of Glendale and City Council of Glendale.

Young & Young and George W. Young for Respondent and Real Party in Interest Chevy Chase Estates Association.

This appeal follows the denial of a petition for writ of administrative mandate filed by Mardian and Associates and West Tujunga Officeos Partnership (collectively appellants) against the Glendale City Council (the Council) and the City of Glendale (the City). According to appellants, the trial court should have instructed the Council to set aside its reversal of a Board of Zoning Adjustments (BZA) decision which upheld a conditional use permit granted in favor of appellants by a BZA hearing officer. We find no error and affirm.

FACTS

I. The administrative proceedings.

In order to build a single family residence on a vacant lot in Glendale (the property), appellants applied to the BZA for a variance and a conditional use permit. Upon consideration by a BZA hearing officer, the applications were granted. In both instances, the BZA hearing officer found, inter alia, that the proposed home would not be detrimental to the public health and safety. Subsequently, Chevy Chase Estates Association (Chevy Chase), the real party in interest, appealed the conditional use permit to the BZA, which upheld the BZA hearing officer.[1] Chevy Chase appealed to the Council, which reversed the granting of the conditional use permit, finding, inter alia, that it would be detrimental to the public health and safety.

At the hearing before the Council, Murray was the first to speak on behalf of the administrative appeal. He indicated that he reviewed the plans for the proposed home, and then he stated: "When you look at that house from three elevations, it is, to the visual eye, four and one half stories tall. Three floors of living space and one and a half stories

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[1] A Council member later asked Dick Murray (Murray), Chevy Chase's vice president, why the variance was not appealed. Murray replied: "I must confess someone overlooked it. I don't know quite [] what happened." He then stated: "[W]e would and should have appealed the variance. Because . . . it is an exception. You call them fancy names, like variances and [conditional use permits], but they're nothing more than exceptions."

of what appear to be retaining walls. [¶] You can look at it. That's four and a half stories tall when you look at it from three separate locations. It is massive. One of our directors will show you pictures similar to it, which is on that same street. That too is massive. [¶] It is our position, gentlemen, . . . that the [Council] has an opportunity to make clear to the public of this city that you, like we, do not want to see such massiveness."

According to Murray, approximately four homes would have a direct view of the home proposed by appellants.

Next up was Gene Whitaker (Whitaker), a resident who lives two blocks from the property. Whitaker testified in part: "I am opposed to the construction of this very large house on a very steep and narrow lot. [¶] My primary concern is the size of the project and its visual impact on the hillside. I do not believe the [Council] and community members who worked so hard to pass the 1993 hillside ordinance that was adopted, that this project complies with their intentions. [¶] The hillside design guidelines, as adopted in 1993, state[d], and I am quoting: 'Houses should be of a design that minimizes massing and bulk to avoid being a prominent feature of the landscape.' [¶] Looking at the drawings on the wall, I submit this house clearly qualifies as a very prominent feature of this landscape."

Whitaker noted that the street dead ends into a gated fire road, and that turning around is very difficult. He was of the opinion that earth moving equipment, dumpsters, and building materials could not be safely stored at the site and that the fire road potentially would be blocked. Also, Whitaker suggested that the view of homes yet to be constructed would be blighted.

Another resident, Thomas Kuvonni (Kuvonni) opined: "[T]he size, weight and mass of the proposed house is inconsistent and incompatible with the surrounding homes in the Chevy Chase canyon. [¶] . . . [¶] The proposed large home with the massing which has been discussed is four and a half stories. The point is that it is excessive and incompatible and inconsistent with the surrounding area. [¶] Public safety and environmental issues are of concern. The proposed home is adjacent to a high brush and

high fire danger area. [¶] . . . [¶] We believe the proposed new home is incompatible with the zone and its surroundings. We suggest to the [Council] that if the [conditional use permit] is granted, that it sends a signal and creates a precedent for developers and contractors, as well as the BZA."

Resident Suzanne Midas Yribe (Yribe) explained: "I would have not bought in this area nor paid a large amount of money for my home if the canyon were filled with huge chunks of cement. I could live in Silver Lake. I could live in Echo Park. I could live in Hollywood Hills. But I chose to live in Chevy Chase Estates because of the open land policy that I believed was adopted. [¶] . . . [¶] The design which was obviously carefully drafted by the developer resembles another house which is on the road. And here we have the problem of compatibility. This house may be compatible with other houses that exist, however it is incompatible with the very house which council [*sic*] watched their planning commission present as basically an abomination of the hillside. . . . [¶] This was one of the examples . . . that was presented by the planning department itself as to what the hillside ordinance was trying to prevent. You judge if there's a similarity."

Yribe concluded by rejecting any suggestion by the developer's lawyer that no views would be affected. "He has never been in my living room. I live right across from this hillside. Part of the reason I spent the money on my house is that I do not see a huge concrete slab. And I will if this house is developed. So will my neighbor above me, to the side of me."

Vic Marian, Judy Trumbo (a member of the BZA), and appellants' attorney spoke in support of the conditional use permit. They argued that the proposed house was well within the applicable guidelines.

When one of the Council members asked if appellants would be willing to reduce the size of the house, their attorney declined, at one point stating that appellants had an "approval of a variance to build 2,993 square feet[.]" The City's attorney, however, advised the Council thusly: "Mr. Mayor, members of the [Council], there certainly may be, and are, interesting legal issues relative to this case, particularly with regard to the

fact that a variance was granted and not appealed and how that complicates the issue of the [conditional use permit]. [¶] However, one issue that really should not concern you is the issue of a vested right to build a house at 2,945 square feet based upon granting the variance. [¶] The variance was for a four-foot height variation in the code, not to build a house of that particular size. So that issue should not concern you."

II. The superior court proceedings.

Appellants filed a petition for writ of administrative mandate, arguing that the Council's decision was invalid because: (1) the Council ignored the res judicata and collateral estoppel effect of the ruling that the variance would not be detrimental to the public health and safety; and (2) there was insufficient evidence to support the Council's adverse findings.

The trial court summarized the case as follows: "[Appellants] wish to construct an approximately 3000 square foot residence on a steeply sloped lot. The steepness of the lot prevented [appellants] from building the desired residence and complying with the setback and building height require[e]ments of the city building code. When the front side of the residence was pushed back the required distance from the property line, the backside of the residence was pushed far enough downhill so that it exceeded the height limit. [Appellants] therefore sought a variance to change the setback and height requirements to accommodate their desired building plan. Municipal ordinances also prohibited the construction of any residence where the slope of the property exceeds 50 percent. Because their property is steeper than that, [appellants] applied for a conditional use permit so that they could build on the lot."

In rejecting appellants' procedural argument, the trial court stated: "No provision of the municipal law of the City . . . is cited to support the contention that the . . . Council is bound by the finding of a subordinate administrative officer." The doctrines of res judicata and collateral estoppel are "inappropriate in this case because the issues considered and decided in granting the variance, and in denying the conditional use permit, were not the same. The variance dealt with the inherent difficulties of building on a steeply sloped lot and complying with height and setback restrictions. The

conditional use permit dealt with the issue of whether any building should be permitted on such a lot."

The trial court found that the Council's decision was otherwise supported by substantial evidence and denied the petition.

This appeal followed.

Subsequently, in its reply brief, Chevy Chase requested that we sanction appellants for filing this appeal.

CONTENTIONS

Appellants contend:

1. The variance and the findings therein are res judicata and collateral estoppel.

2. The Council acted without or in excess of jurisdiction.

3. The administrative trial was unfair.

4. The Council prejudicially abused its discretion by not proceeding in the manner required by law.

5. The Council prejudicially abused its discretion in that its decision is not supported by the findings.

6. The Council prejudicially abused its discretion in that its findings are not supported by the evidence.

STANDARD OF REVIEW

Upon the filing of a petition under Code of Civil Procedure section 1094.5, a trial court determines whether a fundamental right has been substantially affected. If so, the trial court reviews the administrative record and exercises independent judgment. (*Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519, 1525 (*Goat Hill*).) But "[i]f the decision does not substantially affect a fundamental vested right, the trial court considers only whether the findings are supported by substantial evidence in the light of the whole record. [Citation.]" (*Id*. at pp. 1525-1526.) In either event, when we are confronted with a substantive challenge, our review of the trial court's judgment on a petition for writ of administrative mandate is limited to determining if it is supported by substantial evidence. (*Ibid*.)

Regardless of the rights implicated, a trial court must independently assess an appellant's challenge to the fairness of the administrative proceeding. (*Western Air Lines, Inc. v. Schutzbank* (1968) 258 Cal.App.2d 218, 226-227.) We will not disturb the trial court's findings with respect to fairness or unfairness unless they are not supported by substantial evidence. (*Id*. at p. 226; but see *Anserv Ins. Services, Inc. v. Kelso* (2000) 83 Cal.App.4th 197, 204 [using a de novo standard of review when reviewing the fairness of a licensing matter].) In contrast, when the trial court has decided a pure question of law on undisputed facts, such as a jurisdiction issue, we employ the de novo standard of review. (*Ibid*.)

DISCUSSION

1. Preliminary digression: the trial court's standard of review.

Before we begin, we disabuse appellants of their assumption that this case involves a fundamental vested right that required the trial court to conduct an independent review of the administrative record.

In their opening brief, in the "Scope of Review" discussion, appellants state: "In this case [appellants] contend[] that the independent judgment test is met because the [Council] sought to ignore the res judicata/collateral estoppel rights of [appellants] which are binding on the City, and to find the exact opposite as the basis of denying them the [conditional use permit they] need[] to build their house." Elsewhere, in section III of their "Argument," they contend that they had "a vested right not only to the Variance to construct a house . . . , but to the underlying findings with respect thereto."

These two purported rights are indistinguishable. The question becomes: Is there a vested right at issue?

To begin, we note the following: Having made a statement, an appellant is expected to back it up with the law. "'[E]very brief should contain a legal argument with citation to authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' [Citation.] [¶] It is the duty of appellant's counsel, not of the courts, 'by argument and the citation of authorities

to show that the claimed error exists.' [Citation.]" (*Sprague v. Equifax, Inc.* (1985) 166 Cal.App.3d 1012, 1050 (*Sprague*).)

The reason we put appellants to task is simple. We are duty bound to presume that any judgment appealed from is correct. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) We adopt all intendments and inferences to affirm the judgment unless the record expressly contradicts them. (See *Brewer v. Simpson* (1960) 53 Cal.2d 567, 583.) The only reason for us to ever deviate from these presumptions, intendments, and inferences is if an appellant gives us good cause.

Below, the trial court rejected appellants' invitation to recognize the existence of a fundamental vested right. Were we to go the other way, it would only be upon a showing that the trial court erred. However, appellants neglected to cite any law in support of their novel contention. We are left only with our presumptions, intendments, and inferences. End of issue.

To be complete, and because the City, the Council, and Chevy Chase discuss it, we examine the import of *Goat Hill*.

In *Goat Hill, supra,* 6 Cal.App.4th 1519, the owner of a tavern that had been in business for 35 years applied for renewal of a conditional use permit. When the owner's application was denied, he sought administrative mandate. The superior court reversed, and the Court of Appeal affirmed. (*Id*. at pp. 1522, 1529.) *Goat Hill* stated that the owner had a fundamental vested right to continue operating a business in which he had made a substantial investment. (*Id*. at p. 1529.) Generally, however, the court noted that "courts have rarely upheld the application of the independent judgment test to land use decisions." (*Id*. at p. 1527.)

Whether to apply the independent judgment test "'must be decided on a case-by-case basis. [Citation.] Although no exact formula exists by which to make this determination [citation] courts are less sensitive to the preservation of purely economic interests. [Citation.] In deciding whether a right is "fundamental" and "vested," the issue in each case is whether the "'affected right is deemed to be of sufficient significance to preclude its extinction or abridgment by a body lacking *judicial* power.' [Citation.]"'

[Citation.]" (*Goat Hill, supra*, 6 Cal.App.4th at p. 1526.) A court must look at whether a legitimately acquired and otherwise vested right "'is of a fundamental nature from the standpoint of its economic aspect or its effect . . . in human terms and the importance . . . to the individual in the life situation.'" (*Ibid*.) When an administrative decision restricts a property owner's profits, but it does not force the owner out of business or take his property, the interest implicated is primarily economic and the substantial evidence rule will apply. (*Id*. at pp. 1527-1528.)

In the view of the *Goat Hill* court, "[i]nterference with the right to continue an established business is far more serious than the interference a property owner experiences when denied a conditional use permit in the first instance." (*Goat Hill*, *supra*, 6 Cal.App.4th at p. 1529.)

Appellants do not argue that they had a fundamental vested right in building their planned house, nor could they. They are not seeking to renew a conditional use permit, which would have been subject to "a heightened judicial review." (*Goat Hill*, *supra*, 6 Cal.App.4th at p. 1530.) Importantly, their property has not been taken away from them, and they can always build a different house. In other words, they have an economic interest in the proposed house at stake, not a personal, vested interest in a structure that is already standing.

2. Res judicata and collateral estoppel.

a. *The law.*

"Res judicata prohibits the relitigation of claims and issues which have already been adjudicated in an earlier proceeding. The doctrine has two components. "'In its primary aspect the doctrine of res judicata [or 'claim preclusion'] operates as a bar to the maintenance of a second suit between the same parties on the same cause of action." . . . The secondary aspect is "collateral estoppel" or "issue preclusion," which does not bar a second action but "precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding."' [Citations.]" (*Kelly v. Vons Companies, Inc.* (1998) 67 Cal.App.4th 1329, 1335.)

The elements of the collateral estoppel doctrine are well-established. "'First, the issue sought to be precluded from litigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. . . .' Even if these threshold requirements are satisfied, the doctrine will not be applied if such application would not serve its underlying fundamental principles." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 849 (*Gikas*).)

"In determining what issues were 'actually litigated' in the underlying action the court in the subsequent action cannot rely exclusively on the findings in the underlying action but must 'carefully scrutinize' the pleadings and proof. [Citation.] This scrutiny includes looking behind the findings at the evidence presented to determine what was actually decided. [Citation.]" (*Schaefer/Karpf Productions v. CNA Ins. Companies* (1998) 64 Cal.App.4th 1306, 1314.)

These rules apply to decisions rendered by quasi-judicial administrative agencies. (*City and County of San Francisco v. Ang* (1979) 97 Cal.App.3d 673, 678; see *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 410 ["'. . . where an administrative tribunal has rendered a quasi-judicial decision which could be challenged by administrative mandamus pursuant to Code of Civil Procedure section 1094.5, a party's failure to pursue that remedy may collaterally estop a federal civil rights action. This "is a form of res judicata, of giving collateral estoppel effect to the administrative agency's decision, because that decision has achieved finality due to the aggrieved party's failure to pursue the exclusive *judicial* remedy for reviewing administrative action."' [Citation.]"]; *Patrick Media Group, Inc. v. California Coastal Comm.* (1992) 9 Cal.App.4th 592, 617 ["Having failed to avail itself of either of these available remedies, after receiving actual notice of the Commission's action, the issue of its entitlement to compensation became res judicata upon expiration of its time to petition for the writ."].)

b. *The BZA hearing officer's findings did not foreclose the Council's ruling.*

According to appellants, the hearing officer's finding that the variance would not be detrimental to the public welfare applies equally to the conditional use permit and binds the City and Chevy Chase.

We disagree.

(1) Applicability of res judicata and collateral estoppel.

The City and Chevy Chase are not seeking to litigate claims that they brought or could have brought before. Based on that, appellants cannot argue claim preclusion. On the other hand, they can argue issue preclusion if collateral estoppel applies to lower administrative findings.

The trial court indicated that the parties did not cite any law suggesting that the Council was bound by the findings of the BZA hearing officer. We are in much the same boat. Appellants failed to cite any law establishing that collateral estoppel attaches to lower administrative findings that are subject to review by a higher administrative authority as opposed to review by the superior court pursuant to Code of Civil Procedure section 1094.5. However, for purposes of this appeal, we assume without holding that collateral estoppel can be applied.

(2) Identity of issues, actually litigated, necessarily decided.

Appellants applied for a variance to allow the construction of a new single-family residence to extend beyond the building envelope (height restriction) imposed by Glendale Municipal Code sections 30.28.140 and 30.28.150 for the restricted residential zone where the property is located.

In order to qualify for a variance, appellants had to demonstrate: "a. The strict application of the provisions of any such ordinance would result in practical difficulties or unnecessary hardship inconsistent with the general purposes and intent of the ordinance; [¶] b. There are exceptional circumstances or conditions applicable to the property involved or to the intended use or development of the property that do not apply generally to other property in the same zone or neighborhood; [¶] c. The granting of the variance will not be materially detrimental to the public welfare or injurious to the

property or improvements in such zone or neighborhood in which the property is located; and [¶] d. The granting of the variance will not be contrary to the objectives of the ordinance. . . ." (Glendale Municipal Code, § 30.16.290.)

The BZA hearing officer granted a variance with conditions after making the findings required under Glendale Municipal Code section 30.16.290. In relevant part, he found:

"1. The strict application of the provisions of the ordinance would result in practical difficulties or unnecessary hardship inconsistent with the general purposes . . . of the ordinance in that the [appellants] would not be able to construct a new single family house which is functional, compatible with the neighborhood, and takes advantage of the topography of the site while avoiding the potential problems associated with the configuration, location, and topography of the site. The proposed house will contain 2,993 square feet of floor area and a two-car garage on a 10,254 square foot lot. The proposed single-family house will have a floor area ratio of 29.2 percent and a lot coverage of 18 percent consistent with the City's development standards. The variance request for the overall height of the proposed house only exceeds by 4 feet to allow a functional floor plan. The two-car garage and the first floor entrance to the house would be the only visible floor of the house from [the road].

"2. . . . The combination of site topography and street design dictate the location and general design of the house, garage, and driveway approach to the extent that a small degree of variance from Code standards related to building envelope is necessary in order to comply with other aspects of the Code.

"3. The granting of the variance will not be materially detrimental to the public welfare or injurious to the property or improvements in such zone or neighborhood in which the property is located considering the degree of deviation from the Code which is proposed. The project design is compatible with the neighborhood, minimizes the impacts of the project on the environment by minimizing the grading of the terrain to construct the project, and it extends only one story above the street level along the [street] frontage of the lot. The proposed development meets the intent of the zoning ordinance

and will not be detrimental to the public health or safety. Similar uses exist in the area and have not proven to be detrimental to the general welfare of the neighborhood or the environment.

"4. The granting of the variance will not be contrary to the objectives of the ordinance in that a building height appropriate to the site will be provided. The design will minimize the visual impact of the house to the extent possible. The degree of variance granted is minimal and only allows reasonable flexibility in the project design. The project is consistent with the surrounding neighborhood and in keeping with the various elements and objectives of the General Plan. Adequate public and private facilities, such as setback, utilities, landscaping and open space will be provided for the proposed use. The structure is well planned and properly accommodated and located on the site."

Because appellants' property had a slope that exceeded 50 percent and was less than 80 feet wide, it fell within the ambit of Glendale Municipal Code section 30.28.060(b). Therefore, they had to obtain a conditional use permit before building. To do so, they had to show: "a. That the proposed use will be consistent with the various elements and objectives of the general plan. [¶] b. That the use and its associated structures and facilities will not be detrimental to the public health or safety, the general welfare, or the environment. [¶] c. That the use and facilities will not adversely affect or conflict with adjacent use or impede the normal development of surrounding property. [¶] d. That adequate public and private facilities such as utilities, landscaping, parking spaces and traffic circulation measures are or will be provided for the proposed use. . . ." (Glendale Municipal Code, § 30.16.520.)

On appeal, the Council found in part:

"2. That the use and its associated structures and facilities will be detrimental to the public health or safety, the general welfare, or the environment due to the massiveness, height and size of the proposed dwelling unit. The proposed home would be on a lot next to an existing home of substantially smaller size. The proposed home is 2,945 square feet on a steep downhill lot (56.12% average current slope), exposing a

large wall to property owners and the public below the proposed home. A smaller home of approximately 2200 square feet would be more consistent with the neighboring property (approximately 1700 square feet). The rural character of the neighborhood is apparent from the vegetation, winding streets with no parkways, no sidewalks, and in many cases, no curbs. The absence of the above along with low profile development results in scenic vistas as one drives through the area. The large home as proposed (three stories, with the appearance of four stories of massing) is inconsistent with the rural character and would diminish the scenic, low profile rural environment typical of this canyon area.

"3. That the use and facilities will adversely affect or conflict with adjacent uses or impede the normal development of surrounding property with minor impacts of vehicle during construction. . . ."

"The home should be redesigned to retain the rural nature of this unique canyon area and a home which reduces massing by lowering square footage could accomplish this goal. Individuality of design is encouraged so long as the design does not impair the scenic and rural character of the neighborhood, is not detrimental to the environment, and is compatible with its surroundings. However, the design and massing of the proposed home, is incompatible with the immediate area, would be detrimental to the scenic and natural environment and would be inimical to the general welfare of the immediate area and community generally."

While the BZA hearing officer and the Council made some findings that on their face may appear similar, the similarity is superficial. Both opined as to whether the proposed home was compatible with the surrounding area. However, the BZA hearing officer did so in relation to the height of the project, not the proposed use on a lot fitting within the scope of Glendale Municipal Code section 30.28.060(b). The Council also considered height, but it did so in conjunction with massiveness and size while evaluating the total use. Moreover, the Council was required to consider the adverse impact on adjacent use, which was not a consideration in connection with the proposed height variance. Specifically, the Council found that the proposed use would expose "a large

wall to the property owners and the public below the proposed home" and then opined that a "smaller home of approximately 2200 feet would be more consistent with the neighboring property (approximately 1700 square feet)." We note, additionally, that while the BZA hearing officer's findings referenced the impact of the project on the environment, that is not a consideration under Glendale Municipal Code section 30.16.290, the variance ordinance. Conversely, environment is an issue for purposes of Glendale Municipal Code section 30.16.520, the conditional use permit ordinance. One need only compare the wording of the ordinances to see that they are similar but different and, further, that the latter is broader in its scope of considerations than the former.

From the foregoing, we conclude that because the conditional use permit required the Council to consider a variety factors that were disparate from those relevant to the variance, the issues were not identical.

Due to the foregoing, it stands to reason that the conditional use permit issues presented by this appeal were not actually litigated or necessarily decided in connection with the height variance.

(3) The underlying fundamental principles of collateral estoppel.

Even if we were to find that the elements of collateral estoppel were otherwise satisfied, we would decline to apply the doctrine.

In our view, when the City appealed the BZA hearing officer's decision on the conditional use permit, it meant to appeal all findings encompassed within that decision. If it encompassed findings made in connection with the variance proceeding, then they were fair game. This comports with the rationale California employs in allowing a reviewing court to reach issues nonseverable from an unchallenged portion of a judgment when deciding a partial appeal. (See *American Enterprise, Inc. v. Van Winkle* (1952) 39 Cal.2d 210, 217-218 (*American Enterprise*.)

In *American Enterprise*, the appellant argued that issues necessarily determined in the unchallenged portion of the judgment had become final and could not be reviewed on a partial appeal. (*American Enterprise*, *supra*, 39 Cal.2d at p. 216.) The court disagreed. "The appellant relies upon the rule of res judicata. 'Ordinarily that doctrine is applicable

to issues which have been determined by final judgment in another action. It is not effective when there has been as yet no final judgment on all the issues between the parties.' [Citation.] Implicit in any holding that a portion of a judgment by its finality controls the disposition of another portion upon appeal is the conclusion that the same issues permeate both portions and that they are not severable. To give that part of the judgment not specified by American Enterprise's notice of appeal the effect which it seeks would be to disregard the settled rule of the many cases which hold that an appeal from a nonseverable portion of a judgment brings to the appellate court for review *all* of the interwoven parts." (*Id*. at p. 218.)

Here, the variance and conditional use permit applications were granted in connection with proceedings that pertained to the same property. The BZA hearing officer issued his rulings as to both applications on the same day, and those rulings shared certain conclusions and findings. The appeal from the grant of the conditional use permit was the functional equivalent of a partial appeal. If the issues were identical (which they are not), we would conclude that they are nonseverable and should have been subject to the Council's review. This is not a case where a party sat on its rights. This is not a case where a party is seeking to undo findings that it never challenged with a timely appeal. Chevy Chase acted promptly by filing an appeal encompassing all the issues connected with the conditional use permit.

In situations such as this, the fundamental principles of collateral estoppel would not be served by its application.

(4) Appellants failed to support their position.

To lobby us for reversal, appellants state: "Although the City and [Chevy Chase] attempt[] to paint the Variance as narrowly dealing with whether the house could be a few feet taller than otherwise permitted in the building envelope, the findings underlying that determination bely this argument and show that the Variance dealt with the project in *all* of its aspects."

Missing from this analysis is any suggestion that the issues were identical or actually and necessarily litigated. In their opening brief, appellants cite *Sutphin v. Speik* (1940) 15 Cal.2d 195 for a general statement of res judicata law. Then, in their reply brief, they reference cases they call *Sutphin's* "progeny," and they set forth the facts in *Sutphin*, *Todhunter v. Smith* (1934) 219 Cal. 690, and *Aeroject-General Corp. v. American Excess Ins. Co.* (2002) 97 Cal.App.4th 387. However, appellants did not draw any analogies to their case.

Appellants attack *Gikas, supra,* 16 Cal.4th 841 in their reply, stating that it "is not particularly helpful analytically because, although it states some generalities of doctrine, the Supreme Court held that the particular situation was not to be analyzed under traditional doctrines of Res Judicata or Collateral Estoppel because the legislature had adopted a statute which controlled the specific situations at issue." Frankly, the import of this statement is like fogged glass: unclear. *Gikas* is a California Supreme Court case, and its statement of the law is binding.

3. Jurisdiction, fairness, and the Council's application of law.

Appellants' second, third, and fourth contentions boil down to a complaint that the Council failed to recognize the collateral estoppel effect of the variance ruling by the BZA hearing officer. In summary, they posit: (1) What the Council really did was undo the variance ruling, but the Council lacked jurisdiction to do so because the variance ruling was never appealed. (2) By ignoring the collateral estoppel impact of the variance ruling, the Council gave appellants an unfair trial. (3) The Council abused its discretion by not applying collateral estoppel.[2]

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[2] Appellants contend that the trial court was unfair because the Council "ignored the provisions of the ordinance which it was supposed to be applying, and fell under the weight of a political cacophony that urged it to ignore the property rights of [appellants] or anyone like them whose lots happen to require them to apply for a [conditional use permit]." As well, they argue that the Council incorrectly applied the conditional use permit ordinance. These are veiled sufficiency of the evidence arguments. We deal with sufficiency of the evidence in part 5, *post*.

These contentions collapse in light of our conclusion that the variance proceeding does not have collateral estoppel effect.

4. Sufficiency of the findings.

Quixotically, appellants urge us to conclude that the Council's findings fail to bridge the analytical gap between the raw evidence and the ultimate decision, as required by *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515. We cannot accede.

To establish detriment to the general welfare or environment, the Council's findings cited the massiveness, height and size of the proposed house, and then set forth the particulars. For example, the findings list the square footage of the house, the degree of the slope, and the resultant exposure of a large wall to the owners and public below the house. Next, according to the findings, the area is rural in nature, and the house would not be a compatible use.

These findings are sufficient to support the ruling.

5. Sufficiency of the evidence to support the Council's findings.

a. *The substantial evidence test*.

The test is well established: "[R]eviewing courts . . . in determining the existence of substantial evidence, *look to the entire record of the appeal*, and *will not* limit their appraisal 'to isolated bits of evidence selected by the respondent.' [Citations.] [¶] And the existence of such 'substantial evidence' will be determined as follows: When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion*. [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.)

b. *Application of the substantial evidence test*.

We are not required to make an independent, unassisted study of the record in search of error. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 (*Guthrey*).) Counsel is obligated to refer us to the portion of the record which supports appellants' contentions on appeal. (*Ibid*.) As a corollary: "It is not our responsibility to develop an appellant's argument." (*Alvarez v. Jacmar Pacific Pizza Corp.* (2002) 100 Cal.App.4th 1190, 1206, fn. 11.)

Detrimental to their position, appellants never attempt to apply the substantial evidence test.

First, they urge us to conduct an independent examination of the administrative record. However, not only is appellate review limited to applying the substantial evidence test, but, as we discussed in part 1, *ante*, the trial court's review was similarly limited.

Second, appellants argue that no substantial evidence exists, but their briefs lack follow through. They state: "Whichever standard is followed, however, there is simply stated *no* substantial evidence to support the action of the Council. The Staff Report . . . recommended that the decision of the [BZA] be upheld and the representative from [the BZA] as well as the Planning Director testified showing why the [conditional use permit] should be granted. . . . The evidence is outlined especially . . . at pp. 4-5 and pp. 10-14. [Appellants] urge the Court to review the record with particular reference to the cited matters and the items listed at [section] D . . . pp. 9-10[.]" In the reply brief, appellants focus on the effect of the variance findings and Chevy Chase's request for sanctions.

Simply put, such a meager effort cannot carry the day. Pages 4-5 of the opening brief contain appellants' statement of facts, and part of the history of the administrative procedure. Those pages do little other than set forth appellants' need for a variance and a conditional use permit, and explain the chain of certain rulings and appeals. Pages 9-10, under the heading "Highlights of the Record," contain a list of some of the exhibits lodged with the trial court. Asking us to review these pages on our own is to ask us to

develop appellants' argument. To do so is beyond our province, and would be unfair to the adverse parties.

It appears that there is an additional defect in appellants' briefs. When appellants challenge a trial court's factual findings, they are "'required to set forth in [their] brief all the material evidence on the point and not merely [their] own evidence.' [Citations.] [Appellants'] failure to state all of the evidence fairly in [their] brief waives the alleged error. [Citation.]" (*County of Solano v. Vallejo Redevelopment Agency* (1999) 75 Cal.App.4th 1262, 1274.) Insofar as this appeal challenges the trial court's finding of substantial evidence to support the Council's finding that the conditional use permit would be detrimental to the public welfare and general atmosphere of the area, it was incumbent upon appellants to advert to the testimony of Murray, Whitaker, Kuvonni, and Yribe. That appellants did not do so leads us inexorably to find a waiver and uphold the trial court.

Even if we were to reach the merits, we would conclude that the trial court's decision was supported by substantial evidence. The testimony of Murray, Whitaker, Kuvonni, and Yribe provided evidence that the proposed house would be an eyesore to local residents, would be incompatible with the surrounding area, and would be detrimental to the environment. We cannot substitute our judgment for that of the trial court which, based on the record presented, was not at liberty to substitute its judgment for that of the Council.

6. Chevy Chases's request for sanctions.

California Rules of Court, rule 27(e) permits a respondent to file a noticed motion for sanctions against an appellant for, inter alia, taking a frivolous appeal. The motion must be supported by a declaration. Chevy Chase filed neither the required motion nor the required declaration. Therefore, its request, improperly made in its respondent's brief, is hereby denied.

In the alternative, Chevy Chase tacitly urges us to award sanctions on our own motion pursuant to Code of Civil Procedure section 907. We decline.

DISPOSITION

The judgment is affirmed. The City, the Council, and Chevy Chase shall recover their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
NOTT